IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Hamid @ Kaliya & Anr. Vs. State of Rajasthan
(D.B. CRIMINAL APPEAL NO.721/2006)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 2-6-2006 in Sessions Case No.147/2004 passed by Sh. Nirmal Singh Medatwal, RHJS, Additional Sessions Judge (Fast Track) No.2, Kota.

Date of Judgment: October 19, 2006.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE CHATRA RAM JAT

Mr. Arvind Kumar Gupta] for the appellants.
Mrs. Alka Bhatnagar]

Mr. R.P.Kuldeep, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

Challenge in this appeal is to the judgment dated June 2, 2006 of the learned Additional Sessions Judge (Fast Track No.2) Kota whereby Hamid @ Kaliya and Smt. Memuna, the appellants herein, have been convicted and sentenced under section 302 and 302/34 IPC to undergo imprisonment for life and fine Rs.1,000/- in default to further suffer three months simple imprisonment. Since Hamid @ Kaliya was of unsound mind during the trial and matter requires interpretation of sections 329 and 331 CrPC, we proceed to finally decide this appeal at the admission stage.

2. A look at the order sheet dated January 10, 2005 drawn by the learned trial Judge demonstrates that Medical Board examined appellant

Hamid @ Kaliya and opined that he was a patient of Peronoid Schizophrenia. On the basis of recommendation of Medical Board, learned trial Judge invoked the provisions contained in Section 329 CrPC and postponed further proceeding in the case. Appellant Hamid @ Kaliya was referred to Mental Hospital, Jaipur for treatment.

3. At this juncture it will be appropriate to refer Section 329 CrPC, which reads as under:-

> "Procedure in case of person of unsound mind tried before Court.- (1) If at the trial of any person before a Magistrate or Court of Sessions, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.
> (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Magistrate or Court."

4. Section 331 CrPC however provides for the trial of a person who was incapable of making his defence but has been subsequently found capable of defending himself. Section 331 reads thus:-

> "Resumption of inquiry or trial.- (1) Whenever an inquiry or trial is postponed under section 329, the Magistrate or Court as the case may be, may at any time after the person concerned has ceased to be of unsound mind, resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.
> (2) When the accused has been released under section 330, and the sureties for his appearance produce him to the officer whom

> the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence."

5. Where the trial is postponed under section 329 on the ground of incapacity of the accused to make his defence, and is resumed subsequently, it is to be resumed not at the point at which it was previously stopped but should be commenced de novo. But in the case on hand it appears that trial against Smt.Memuna was continued and on April 8, 2005 Hamid @ Kaliya was produced before the trial Judge and he was tried along with Smt.Memuna and his trial resumed from that point only. The trial did not commence de novo. It also appears that the trial which was postponed under section 329, resumed without recording medical evidence about fitness of Hamid @ Kaliya. It is well settled that when a trial is postponed under section 329 CrPC, its resumption without recording medical evidence will vitiate it.

6. Since there is nothing on record to show that the appellant ceased to be of unsound mind, the whole trial against Hamid @ Kaliya stands vitiated. The trial would stand vitiated against co-accused Smt.Memuna also as the unsoundness of Hamid @ Kaliya during the recording of evidence, did have an effect on the entire complexion of the case.

7. For these reasons, the appeal stands allowed and the impugned judgment dated June 2, 2006 of learned Additional Sessions Judge (Fast Track) No.2, Kota is set aside and the case is remanded back to learned Additional Sessions Judge (Fast Track) No.2 Kota for de-novo trial in

accordance with law.

In view of the fact that Memuna is a woman, we are inclined to grant her bail provided she furnishes a personal bond in the sum of Rs.50,000/- with two sureties of the like amount to the satisfaction of learned trial Judge.

In regard to appellant Hamid @ Kaliya, we grant him liberty to approach the trial Judge under section 330 CrPC. Record of the case be sent back forthwith.

(Chatra Ram Jat),J. (Shiv Kumar Sharma)J.

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